United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7135

To be argued by
Eric Schnapper

UNITED STATES COURT OF APPEALS
For the Second Circuit

B

Docket Number

75-7135

P/S

WILLY DREYFUS,

Plaintiff-Appellant,

v.

AUGUST VON FINCK, Munich, Germany, and MERCK, FINCK & CO., Munich, Germany,

Defendants-Appellees

BRIEF OF APPELLANT WILLY DREYFUS

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UNITED STATES COURT OF APPEALS

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75-7135

WILLY DREYFUS,

Plaintiff-Appellant,

-against-

AUGUST VON FINCK, Munich, Germany, and MERCK, FINCK & CO., Munich, Germany,

Defendants-Appellees

On Appeal From a Judgment of the United States District Court for the Southern District of New York Dismissing the Amended Complaint

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PRELIMINARY STATEMENT

This is an action brought in the United States District Court for the Southern District of New York by the Plaintiff-Appellant, Willy Dreyfus, a Swiss citizen, against August von Finck and Merck, Finck & Co., Defendants-Appellees, citizens of West Germany, for damages to plaintiff resulting from alleged wrongful conduct of the defendants in violation of plaintiff's rights under certain treaties and the Law of Nations as alleged in the amended complaint. Jurisdiction of the District Court is alleged under United States Code, Title 28, Sections 1331, 1332, and 1350 (App. R).* Upon defendants' motion the District Court, by Judge Charles L. Brieant, Jr., by Order dated January 21, 1975 dismissed the amended complaint.

* Citation to the Appendix will be by "App." followed by the index letter of the Appendix.

ISSUES PRESENTED

1. Does the amended complaint state a claim upon which relief can be granted:

a) Under 28 U.S.C. §§ 1331 and 1350 with respect to alleged treaties of the United States and the Law of Nations;

b) Under 28 U.S.C. § 1331 with respect to Military Law 59 promulgated by the American Military Government pursuant to the Four Power Occupation Agreement on November 10, 1949.*

2. Does the Act of State doctrine preclude the exercise of Federal Jurisdiction in this case?

* This issue has been stipulated by the parties as before this Court by letter of William Schurtman, Esq. dated June 17, 1975, confirming his representation made at oral argument that day upon appellant's motion to remand (App. X).

STATEMENT OF THE CASE

The appellant Willy Dreyfus is a citizen of Switzerland, residing in Montreux. The appellees are each residents in Munich, Germany, and citizens of the Federal Republic of West Germany.

It is alleged in appellant's amended complaint, and in his original complaint (filed December 12, 1973), that shortly before World War II his property in Germany which consisted of interests in the banking firm of J. Dreyfus & Co., was wrongfully confiscated from him by the appellees as a result of their cooperation with the notorious anti-semitic policies of The Third Reich. It is further alleged that after the War appellant sought restitution from appellees, and that a restitution settlement obtained was wrongfully repudiated by appellees, and that the adjustment of appellant's claim finally achieved in 1952 was unconscionably inadequate.

On December 12, 1973, appellant filed a complaint in the United States District Court for the Southern District of New York, and obtained an Order of Attachment of appellees' assets in New York on December 20, 1973, fixing appellant's undertaking in the amount of $150,000. Thereafter, on January 15, 1974 the Order of Attachment was amended to

provide for appellant's undertaking in the amount of $15,000. On January 31, 1974 appellees filed an undertaking with the District Court in the amount of $15,000 and the Order of Attachment was vacated.

In or about January 1974, the summons and complaint were served upon appellees in West Germany by the Clerk of the United States District Court for the Southern District of New York by registered mail pursuant to Rule 4(i)(1)(D) of the Federal Rules of Civil Procedure.

Thereafter, on March 11, 1974, appellees moved to dismiss the complaint upon several grounds (App.H) including lack of subject matter jurisdiction. The motion was heard on May 1, 1974 by Judge Charles L. Brieant, Jr. The legal issue upon which appellees argued and briefed the motion, and upon which appellant responded, was whether the District Court had jurisdiction over the subject matter of the complaint. In a memorandum opinion filed May 20, 1974, Judge Brieant dismissed the complaint after holding that the District Court had jurisdiction over the subject matter; the Court's dismissal was based upon a holding that appellant had failed to state a claim in tort, or otherwise, upon which relief could be granted primarily because of the application of the Act of

conduct on the part of any one of the three

State Doctrine; secondarily the Court held that the complaint did not state a claim arising under any treaty of the United States. (App. L., p. 10)

Appellant moved to reargue the motion of March 11, and after submission of further legal briefs, the Court issued an "Endorsement" granting the motion to reargue, and modifying its memorandum of May 20, 1974, to permit the appellant to serve and file an amended complaint alleging with particularity the specific provisions of any treaties relief on as giving rise to appellant's claim against defendants (App.Q).

An amended complaint was timely filed on July 24, 1974, and by stipulation of counsel was served upon appellees' counsel without concession of personal jurisdiction for the limited purpose of expediting appellees' contemplated motion to dismiss the amended complaint. (App. R.)

By Notice of Motion dated September 11, 1974, appellees moved to dismiss the amended complaint principally upon the ground that it failed to state a claim upon which relief could be granted.

On January 3, 1975, Judge Brieant filed a memorandum decision granting appellees' motion holding that the specific

treaties alleged in the amended complaint did not provide for the assertion of private claims and that therefore no claim for relief had been stated which was "cognizable in this Court." (App. T, p. 22). On January 21, 1975, Judge Brieant filed a "Corrected Order and Judgment" from which this appeal was taken. The corrected judgment superceded a broader order of dismissal previously filed by the Court and provided that the dismissal of the amended complaint was "without prejudice to any cause of action arising under the common law or statutes of any other nation and with prejudice as to the cause of action stated therein upon the treaties specifically alleged in the amended complaint and the United States laws specifically alleged in the amended complaint." (App.U).

A Notice of Appeal was filed on February 18, 1975.

In the preparation of the appellant's brief on appeal counsel determined that the relevant law had not been alleged in the amended complaint as a basis for the claim, and that the District Court had not considered it. Accordingly, after consulting with counsel for the Second Circuit, appellant moved for an order remanding the case to the District Court to consider Military Law No. 59 as a legal basis for

appellant's claim which would be "cognizable" in the District Court. Appellees opposed this motion asserting that Military Law No. 59 had been presented to Judge Brieant and that he had had it before him by virtue of appellees' brief. By way of resolution at oral argument before this Court it was stipulated by appellees' counsel that this Court should consider Military Law No. 59 on this appeal. Counsel's letter of stipulation is included in the Appendix (App.X).

STATEMENT OF FACTS

As this appeal proceeds from the judgment of dismissal of the amended complaint herein, and as there are no further pleadings or factual material in the record, the only facts before this Court are those alleged in the amended complaint, which for the purposes of the motion to dismiss granted by the District Court were assumed as true, and must be so assumed by this Court.

However, because it has been stipulated that this Court may consider Military Law No. 59, certain facts which would have been stated below if the appellant's motion to remand had been granted are set forth in the argument infra pp. 30-34.

Argument

Point I

JURISDICTION OVER THIS ACTION IS CONFERRED BY 28 U.S.C. § 1350 SINCE IT ALLEGES A TORT IN VIOLATION OF THE LAW OF NATIONS

Plaintiff grounded his complaint on Title 28 United States Code § 1350, insofar as that statute creates federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of law of nations." Plaintiff, a Swiss national, is concededly an alien; that the conduct alleged, including the forceable seizure of plaintiff's property and the wrongful repudiation of restitution, is tortious cannot seriously be questioned. The controlling issue, is whether the conduct alleged in the amended complaint constitutes a tort which violates the "law of nations".

For reasons which are discussed infra, plaintiff's nationality at the time of the alleged tort is of some significance. Plaintiff was originally a dual national, and was thus technically a citizen of both Switzerland and Germany. However, because he was a Jew as well as a Swiss national, plaintiff was treated by the Nazi government as an alien in more than just the normal sense of that term. Under evolving laws and practices of

the 1930's in Germany, Jews were regarded as racially, socially and politically alien to the Third Reich. This policy led to a series of restrictive measures, culminating in the Nuremberg Laws on September 15, 1935, a statute formally stripping all Jews including plaintiff, of their status as citizens of the Third Reich.*

28 U.S.C. § 1350 derives from § 9 of the Judiciary Act of 1789. 1 Stat. 73, 77. The provision covers torts in violation of both treaties of the United States and the law of nations, but in 1789 the latter provision was by far the more important. In the eighteenth century the precepts of conduct applicable to nations and their nationals were not codified in treaties, as subsequently occurred in the twentieth century, but were the subject of custom, practice, and precedent setting ad hoc agreements in a combination not unlike early common law. The meaning of the "law of nations" as applied in any particular case was generally divined by reference to scholarly "works of jurists, writing prefessedly on public laws; or by general usage and practice of nations; or by judicial decisions recognizing and enforcing that law". United States v. Smith, 18 U.S. 71, 74 (1820). It was

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* 7 Encyclopedia Judaica 457 at p. 489, 1971 ed.

rare that a treaty in force was applicable to a particular dispute. As of 1789, the United States was party to a total of five treaties with four countries.

The Law of Nations, as that phrase was understood at the time of the First Judiciary Act, embraced a body of standards and practices, both formal and informal, which had grown up with the birth of nation states and the problems among them occasioned by the rapid expansion of international commerce.

> "It was not until the revival of commerce on the shores of the Mediterranean, and the revival of letters and the study of the Civil Law by the discovery of the Pandects had an increased enterprise to maritime navigation, and a consequent importance to maritime contracts, that anything like a system of international justice began to be developed. It first assumed the modest form of commercial usages; it was next promulgated under the more imposing authority of royal ordinances; and it finally became by silent adoption a generally connected system, founded in the natural convenience, and asserted by the general comity of the commercial nations of Europe. The system thus introduced for the purposes of commerce has gradually extended itself to other objects, as the intercourse of nations has become more free and frequent." (Story, Commentaries on the Conflict of Laws, Ch. 1, p. 6.)

By the eighteenth century the Law of Nations, or "jus gentium", was an accepted part of the law in England and the colonies, routinely enforced in the courts.

"English lawyers were accustomed to identifying the major divisions as the law of merchants, the law maritime, and what, for want of a better name, we may call the law of states." Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U.Pa.L.Rev. 26 (1952). It was pre-eminently with the protection of international commerce, and with the resolution of problems therein, that the Law of Nations was concerned with special concern focused on the treatment by governments of aliens doing business within their territory. Id. at 27-31. See Lopes v. Reederei Richard Schroder, 225 F.Supp. 292, 297 (D.D. Pa. 1963).

It was in this primary aspect as regulating international commerce that the law of nations interested the founding fathers when § 1350 was adopted. Madison expressed concern during the debates on ratification of the Constitution that foreign merchants had been unable to have justice done in state courts, "and this has prevented many wealthy gentlemen from trading or residing with us.* Since both as a matter of practice and law, the rights of American merchants abroad would depend as a matter of reciprocity on the rights of foreigners here, those rights were a matter

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* 3 Elliott's Debates, 583 (1888).

of national concern. See 45 Am.Jur. 2d, "Enter National Law" § 7. The treatment of foreign nationals, where international law was involved, was a foreign policy problem as well. Hamilton argued in the Federalist -

> "The union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it. As the denial or perversion of justice by the sentences of courts is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned. ... arising upon treaties and the laws of nations, . . . *

§ 1350 reflected "a concern for uniformity in this country's dealings with foreign nations and [indicates] a desire to give matters of international significance to the jurisdiction of federal institutions." Banco National de Cuba v. Sabbatino, 376 U.S. 398, 427 n.25 (1964).

The importance attached by the early Congresses to the protection of international commerce and to aliens engaged therein is amply evidenced by the treaties ratified in those earlier years. Virtually every treaty made in the years before 1800 contained an express provision

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* The Federalist, No. 80.

protecting the rights of Americans to do business in the territory of the other nation involved, and vice versa.* The Founding Fathers expressly recognized the injustice of permitting the seizure or confiscation of alien property. Both the provisional peace treaty signed with the British in 1782, and the final treaty of 1783, expressly assured,

> That there shall be no future confiscations made . . . against any person or persons for, or by reason of the part which he or they may have taken in the present war; and that no person shall, on that account, suffer any future loss or damage either in his person, liberty or property.**

This prohibition was of course judicially enforceable under Article VI of the Constitution. Martin v. Hunter's Lessee, 1 Wheat (14 U.S.) 303 (1816). In addition the Federal government obligated itself to do what it could about previous confiscations.

> It is agreed that the Congress shall earnestly recommend it to the legislatures of the respective States, to

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* See e.g. Treaty of Amity and Commerce Between the United States and France, Article III, IV, X, XX, XXIII (1778); Treaty of Amity and Commerce Between King of Prussia and the United States, Article IV, XII, XXIII (1785); Treaty of Peace and Friendship Between the United States and Morocco, Article XVII, XXIV (1787); Treaty of Peace and Amity Between Algiers and the United States, Articles II, XIV, XVIII (1795); Treaty of Friendship Between United States and Spain, Articles XIII, XV, XXII (1795).

** Provisional Treaty of Peace, Article VI (1782); Definitive Treaty of Peace, Article VI (1783).

> provide for the restitution of all estates, rights and properties which have been confiscated, belonging to real British subjects . . . . *

In the remaining years of the eighteenth century the United States signed treaties with five other nations, France, Spain, Prussia, Algiers, and Morocco; each of these treaties protected merchants against confiscation, and provided that in the event of war the alien merchants in each country would be permitted time to properly dispose of their property before departing the country.

The earliest cases arising under § 1350 were, as this case, actions for the return of property unlawfully acquired, or resulting damages. In Bolchos v. Darrel, 3 Fed. Cas. No. 1, 607 (1795), a dispute arose over the ownership of certain slaves who had been seized aboard a Spanish prize. In the resulting action under § 1350 the original owner invoked the principle of the law of nations that neutral property so seized belonged and must be returned to a neutral party. In Moxon v. The Fanny, 17 Fed. Cas. No. 9, 895 (1793), the owner of a British vessel, The Fanny, by a French privateer sued under § 1350, claiming that the privateer could not lawfully capture

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* Provisional Treaty of Peace, Article V (1782); Definitive Treaty of Peace, Article V, (1783).

The Fanny since she was in neutral waters, and that the seizure was thus an actionable tort. Both Bolchos and Moxon involved a tort occurring in such circumstances as to raise questions regarding the obligations of a nation or its nationals to foreign nationals.

The only Supreme Court decision applying § 1350 involved the alleged confiscation by a government of the commercial property of an alient. O'Reilly v. Brooke, 209 U.S. 45 (1908). In O'Reilly the plaintiff was a Spanish national, and the government accused of the seizure was the United States. Plaintiff sought damages for termination by the American military governor in Cuba of her rights to operate a slaughterhouse in Havana. Although the claim was ultimately rejected on other grounds, O'Reilly is generally understood to establish the proposition that "an unjustified seizure of another's property in a foreign country by a United States officer would come within" § 1350. Khedivial Line v. Seafarer's International Union, 278 F.2d 49, 52 (2d Cir. 1960); Lopes v. Reederei Richard Schroder, supra. Other Supreme Court decisions involving the law of nations generally involved disputes over the ownership of private property by citizens of different countries where the dispute arose in a context with

foreign policy implications. The Nereide, 13 U.S. (9 Cranch) 388 (1815); The Pacquete Habana, 175 U.S. 677 (1899); Hilton v. Guyot, 159 U.S. 113 (1894).

It was clear when § 1350 was adopted that mistreatment of foreign merchants was forbidden by the law of nations. Emer de Vattel, perhaps the pre-eminent eighteenth century writer on the Law of Nations*, stressed the obligation of each nation state to deal fairly with foreign nationals,

> "A sovereign may not allow the right of entrance into his territory to foreigners to prove detrimental to them; in receiving them he agrees to protect them as his own subjects and to see that they enjoy, as far as depends on him, perfect security . . ..
>
> The property of an individual does not cease to belong to him because he happens to be in a foreign country, and it still forms parts of the aggregate wealth of his Nation. The claims which the head of the State might assert over the property of a foreigner would be equally contrary to the rights of the owner and to those of the Nation of which he is a member." (Law of Nations, §§ 104, 109 (1758)).

The sovereign has a responsibility not only to act properly itself, but "to see that his subjects act in a just and peaceable manner" towards foreign states and

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* See, The Pacquete Habana, 175 U.S. 677 (1899).

nationals. These responsibilities arise in large measure from the obligation of each nation to respect the "freedom of commerce" and to protect and foster international trade by removing any "special rights and privileges" which burden that activity. Id. §§ 22-24.

More recently Professor Brierly, in his The Law of Nations (1923), details the established principle that the law of nations establishes an enforceable minimum standard of conduct by one nation towards the citizens of another.

> "[T]he treatment by one state of nationals of another is a matter of concern to international law. No state is legally bound to admit aliens into its territory, but if it does so it must observe a certain standard of decent treatment towards them . . .. Fortunately such controversies are particularly suitable for judicial settlement.
>
> [I]f a state has a low standard of justice toward its own nationals, an alien's position is in a sense a privileged one, for the standard of treatment to which international law entitles him is an objective one, and he need not, even though nationals must, submit to unjust treatment." (The Law of Nations, pp. 137-138.)

The minimum standard of conduct corresponds to the Anglo-American notion of due process.

> In last analysis, a denial of justice is the fundamental basis of an international claim. It connotes some unlawful violation of the rights of an alien. The term however,

> is used in two senses. In its broader application it signifies any arbitrary or wrongful conduct on the part of any one of the three departments of the government -- executive, legislative, or judicial. The term includes every positive or negative act of an authority of the government, not redressed by the judiciary, which denies to the alien that protection and lawful treatment to which he is duly entitled." (Borchard, Diplomatic Protection of Citizens Abroad, p. 330.)

This includes the inexcused failure of the government involved to prevent or redress unjust mistreatment of the alien by its own nationals. Briefly, The Law of Nations, 143-145 (1928).

Borchard has enunciated the generally accepted view that certain mistreatment of an alien is inexcusable even though also imposed upon the nation's own citizens. This rule is embraced by -

> "prevailing theory, law, and practice. If the local administration of justice breaks down, or if it provides for measures not accepted as "due process", such as holding arrested persons incommunicado, executive or legislative confiscations, etc., international law will demand a treatment for foreigners possibly more favorable than nationals obtain." (20 American Journal of International Law, 738, 741 (1926).)

International law

> "has secured to the alien a certain minimum of rights necessary to the enjoyment of life, liberty, and property, and has so controlled the arbitrary actions of the estate. . . . Interna-

> tional law is not concerned with the specific provisions of the municipal legislation of states in the matter of aliens, but with the establishment of a somewhat indefinite standard of treatment which the state cannot violate . . .." (Borchard, The Diplomatic Protection of Citizens Abroad, 27, 39 (1915).)

The consensus of the most recent cases applying § 1350 is that a tort is to be treated as involving a violation of the law of nations when the dispute arises in a context with clear foreign policy ramifications. Adra v. Clift, 195 F.Supp. 857 (D. Md. 1961) was an action by a Lebanaese national to regain custody of his daughter, who had been tortiously taken from him to the United States, an Iraqi national. The child had been brought to the United States by means of a forged passport, in violation of both American and Lebanese law. Since this type of misconduct interfered with the right of the Lebanese government "to control the issuance of Passports to its nationals," and was thus "detrimental to the welfare of international society," the court held the tort to be within the scope of § 1350. 195 F.Supp. at 864-65. In Valanga v. Metropolitan Life Insurance Co., 259 F.Supp. 324, 328 (E.D. Pa. 1966), the court took a similar approach, applying § 1350 to misconduct which transcends the violation

of local norms raises issues of international import and conceivably could constitute an effort to the power and dignity of the nations involved."

The tortious conduct alleged in this case falls within the prohibitions of the law of nations, the concerns of the first Congress, and the rule applied in Adra and Valanga. At issue is the activity of the individual defendants and the Nazi regime against a Swiss national on the ground that he was a Jew, a ground which that regime regarded as pertaining to alienage. In Banco Nacional de Cuba v. Sabbatino, supra, Mr. Justice White noted, with regard to the Nuremberg laws applied in this and the Bernstein litigation -

> "these racial and religious expropriations, while involving nationals of the foreign state and therefore customarily not cognizable under international law, had been condemned in multinational agreements and declarations as crimes against humanity. The acts could thus be measured in local courts against widely held principle rather than judged by the parochial views of the forum." (Id. at 457, n. 18.)

This case, unlike Bernstein, does involve mistreatment of a foreign national. Plaintiff, in precisely the manner which was a primary concern of American policy in the earliest years of republic, was forced to relinquish his property in Germany for a pittance and flee to Switzerland. That mistreatment was of a type certainly seen with dismay by the Swiss government as well as our own.

POINT II

JURISDICTION OVER THIS ACTION IS CREATED BY 28 U.S.C. §§ 1331 AND 1350 SINCE THE COMPLAINT ALLEGES A VIOLATION OF TREATIES OF THE UNITED STATES

Plaintiff asserted jurisdiction existed over his claim on the ground that the alleged conduct of the defendants in conjunction with Nazi authorities violated a variety of treaties. Plaintiff asserts that his property was seized in part in furtherance of a plan, consummated shortly thereafter, to wage a war of aggression. This allegation, if sustained, would clearly establish a violation of the Kellog-Briand Pact (46 Stat. 2343), which binds the contracting parties to settle disputes through "pacific means" and to abandon "recourse to war for the solution of international controversies." The Hague Convention also precludes the use of war as an instrument of international policy, and it and the Kellog-Briand Pact were both the basis of imposing criminal sanctions on German war criminals who had conspired to wage aggressive war. The Nuremberg Trial, 6 F.R.D. 69, 106 (1946). Plaintiff, whose property was confiscated pursuant to this unlawful conspiracy, was clearly within the group whom the Pact and Convention were intended to protect.

28 U.S.C. § 1350 creates federal jurisdiction over any tort "in violation of" a treaty of the United States. Undeniably the tortious conduct alleged violated these treaties. 28 U.S.C. § 1331 creates federal jurisdiction over any action "arising under" a treaty of the United States. The district court, however, without disputing plaintiff's contention that his injuries had been caused by a violation of one or more of the treaties alleged, concluded it had no jurisdiction under § 1331 or § 1350 because none of the treaties "expressly create any private causes of action, for tort or otherwise." (App. T p.10.) The district court asserted that an action was only possible under §§ 1331 and 1350 where "private causes of action were created by express language" of the treaty itself. (App. L p. 11) The court cited as the "classic example" of such a treaty the provisions of the Warsaw Convention creating a cause of action for passengers against international air carriers. Id.

This decision is contrary to every § 1331 action since 1875; although treaty actions have been allowed in a wide variety of circumstances, none of the treaties involved meet the district court's standard. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), is the leading Supreme Court decision upholding a § 1331 treaty action. Plaintiffs there sued under the 1784 Treaty of Fort Stanwix, the 1794 Treaty of

Canandaigua, and the 1799 Treaty of Itarmar. None of these treaties purported to create any cause of action. The lower courts have repeatedly sustained actions under § 1331 involving treaties which do not expressly create any cause of action. See, e.g., Leech Lake Bank of Chippewa Indians v. Herbst, 330 F. Supp. 1001 (D. Minn. 1971); Dodge v. Nakai, 298 F. Supp. 17 (D. Ariz. 1968); Makah Indian Tribe v. McCauly, 39 F. Supp. 75 (W.D. Wash. 1941); Skokomish Indian Tribe v. France, 269 F.2d 555 (9th Cir. 1959); Phelps v. Hanson, 163 F.2d 973 (9th Cir. 1947); Hidalgo County Water Control, etc., District v. Hedrick, 226 F.2d 1 (5th Cir. 1955).

The district court's requirement does not comport with the legislative history of either statute. In 1789, when § 1350 was adopted, there were no treaties in force which expressly created a cause of action. In 1875, when § 1331 was adopted, there still were no treaties in force which expressly created a cause of action. What is necessary under both of these statutes is merely that the treaty establish certain requirements the violation of which injured the plaintiff; it is the statute which creates the cause of action. The sole example cited by the district court as meeting this test is the provision of the Warsaw Convention regarding international air carrier liability to passengers. That Convention, however, does not forbid the carriers to be negligent or to cause death

or injuries; it merely establishes procedures to be followed if local law creates such substantive rights. Thus, this Circuit has repeatedly held that the Convention does not create federal jurisdiction under § 1331. Noel v. Linea Aeroposta Venezolana, 247 F.2d 677 (2d Cir. 1957), cert. denied 355 U.S. 907. See also Zousmer v. Canadian Pacific Air Lines, Ltd., 307 F. Supp. 892 (S.D. N.Y. 1969); Spencer v. Northwest Orient Airlines, 201 F. Supp. 504 (S.D. N.Y. 1962).

At the time when § 1350 was adopted, the only United States treaties in force were those in which, like the Hague Convention and the Kellog-Briand Pact, authorized no lawsuits, but merely contained vague promises by the signatories not to treat individuals in certain ways.* No enforcement procedure whatever was provided. It is difficult to believe that Congress inserted the term "treaty" in § 1350 with the intent that it be totally inoperative. On the contrary, it is clear that Congress was specifically concerned to authorize suits under just such a treaty. In the peace agreements of 1782 and 1783 with Great Britain, the federal government had promised there would be an end to the confiscation of the property of British citizens. But, as Justice Story has pointed out, these treaty stipulations

> "were grossly disregarded by the States under the confederation. They were deemed by the

* See p. 15 , supra.

The enforceability of treaties is essential to the conduct of foreign policy.

> "It is to be considered that treaties constitute solemn compacts of binding obligation among nations; and unless they are scrupulously obeyed and enforced, no foreign nation would consent to negotiate with us; or if it did, any want of strict fidelity on our part in the discharge of the treaty stipulations would be visited by reprisals or war. It is, therefore, indispensable that they may be executed by the judicial power, and be obeyed like other laws."*

Judicial enforcement is essential because, under our constitutional system, it is the only means by which private or state action in violation of a treaty could be stopped or redressed. Unlike the monarchies that flourished in the eighteenth and nineteenth centuries, the President cannot issue an edict that Mr. Von Finck pay Mr. Dreyfus money; it is courts and courts alone which can take such action. Similarly, if a city were to adopt a statute discriminating against aliens, in violation of a treaty guaranteeing certain aliens rights equal to those of citizens, that problem is resolved, not by sending the Secretary of State to negotiate with the foreign government or the municipality, but by a judicial order invalidating that statute. See Asakura v. Seattle, 265 U.S. 332 (1924). Since judicial enforcement is usually the only way of enforcing a treaty in our legal framework, all treaties must be enforceable in this way without the virtually unheard of special language

* Id., pp. 604-05.

required by the district court, for otherwise they would be rendered nugatory.

The district court founded its refusal to remedy the treaty violations alleged on the ground that treaty violations were the sole concerns of the nations involved and subject to remedy only through negotiations between the contracting parties. In general "only states have rights under international law," and private citizens cannot enforce "a compact among nations." (App.T p.8) Article VI provides otherwise.

For almost 150 years the Supreme Court has permitted private parties to sue to enforce, to assert by way of defense, or to otherwise invoke treaties which did not expressly confer a right on individuals or create a right to sue, or otherwise meet the standard set by the district court in this case. Pursuant to the provision in Article VI making all treaties the supreme law of the land, the Supreme Court has permitted individuals to enforce such treaties in actions to establish title, Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 303 (1816); in a habeas corpus action for the return of children, De Couteau v. District Court, 43 L.Ed.2d 300 (1975); in a habeas corpus action attacking a criminal conviction, Erickson v. Feather, 43 L.Ed.2d 300 (1975); in a direct appeal of such a conviction, Antoine v. Washington, 43 L.Ed.2d 129 (1975); in an action to recover state taxes, McClanahan v. State Tax Commission, 411 U.S. 164 (1973);

in an action to recover federal taxes, Maximov v. United States, 373 U.S. 49 (1963); in an action to recover an escheated estate, Corbett v. Stergios, 381 U.S. 124 (1965); as a defense to an action to escheat an estate, Kolovrat v. Oregon, 366 U.S. 187 (1961); in an action for the proceeds of an escheated estate, Hauenstein v. Lynham, 100 U.S. 483 (1880); and in an action to enjoin the enforcement of a municipal law violating a treaty, Asakura v. Seattle, 265 U.S. 332 (1974). If plaintiff had physically seized the funds attached in this action, and defended a suit to recover them by arguing they were really his because the forced sale of his company was void under treaties of the United States, Article VI would have permitted the assertion of that defense even in state court. It is difficult to see why plaintiff c not litigate in federal court the same issue of whether a treaty of the United States has indeed been breached.

In the plethora of cases construing § 1331, no court has ever suggested that the required relationship between a claim and the alleged basis, "arising under," is different for a treaty than for an ordinary statute. In Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974), the Supreme Court applied to a § 1331 treaty action the same construction of the "arising under" requirement applied to statutes in Gully v. First National Bank, 299 U.S. 109 (1936). Supreme Court

decisions since Osborn v. Bank of the United States, 9 Wheat (22 U.S.) 738 (1824) have formulated but a single test as to when a claim arises under a treaty or law of the United States. The lower courts have repeatedly held that the rule of Gully and Osborn is "the same rule" applicable to a treaty claim. Huckins v. Duval County, Florida, 286 F.2d 46, 49 (5th Cir. 1960); Hidalgo County Water Control, etc., District v. Hedrick, 226 F.2d 1, 6 (5th Cir. 1955). Were the language of the Hague Convention or the Kellog-Briand Pact embodied in a statute, the district court conceded plaintiff would have been able to sue under § 1331. Neither that statute nor Article VI of the Constitution authorize a different result merely because a treaty was involved.

POINT III

JURISDICTION OVER THIS ACTION IS CONFERRED BY 28 U.S.C. § 1331 SINCE IT INVOLVES A CLAIM ARISING UNDER MILITARY LAW NO. 59

Following the Allied victory over Germany in 1945, the country was divided into four zones administered by the United States, Great Britain, France, and the U.S.S.R. The Allies recognized the general need for steps to restore property seized or forcibly transferred by the Nazis or otherwise under the Nuremberg laws. Extended discussions among the four powers, however, did not yield a consensus as to the precise procedures to be followed. On November 10, 1947, the American Military Government promulgated Military Law No. 59 "Restitution of Identifiable Property." Similar provisions were subsequently adopted by the British and French.

The history of the litigation which occurred under Military Law 59 is of relevance here. On October 2, 1946, the parties to the instant action entered into a written settlement of plaintiff's claims, which settlement of course the defendants refused to abide by. On July 7, 1948, plaintiff filed a claim under Law 59 with the Central Filing Agency at Bad Nauheim. On August 7, 1948, the parties entered into a written settlement of the then pending claim. Thereafter the

defendants refused to comply with that settlement, and plaintiff asked the restitution courts to compel them to do so. On May 10, 1950, the American Court of Restitution Appeals ruled that the August 7 settlement was binding and enforceable unless defendants could substantiate their allegations that it was provided by fraud. On remand defendants apparently abandoned that contention, but the lower court judge, a German, refused to obey the decision of the higher court, thereupon plaintiff took yet another appeal to the Court of Restitution Appeals, asking that it enforce its earlier order.

At this point the parties are in disagreement as to what occurred. It is clear that, when the case came before the Court of Restitution Appeals in 1951, plaintiff's lawyer announced that he had agreed to settle the case, and for an amount far less than that to which plaintiff was clearly entitled under the Court's earlier order. Plaintiff maintains that this "settlement" was fraudulent, agreed to by plaintiff's lawyer in collusion with the defendants and without consulting or informing plaintiff. The defendants presumably deny these allegations. Insofar as Military Law 59 is concerned, this case presents three questions: (1) Was the settlement of 1951 fraudulent as against plaintiff; (2) Was the settlement

of August, 1948, enforceable; and (3) Was plaintiff entitled to relief for violation of the substantive rights recognized by Military Law 59?

It is clear that Military Law 59 is a "law . . . of the United States" within the meaning of § 1331. It is well established that this phrase is not limited to statutes adopted by Congress, but to any duly promulgated rule that is binding on the persons effected. The courts have thus held within the scope of § 1331, regulations, Murphy v. Colonial Fed. Savings & Loan, 388 F.2d 609 (2d Cir. 1967); Farmer v. Philadelphia Elec. Co., 329 F.2d 3 (3d Cir. 1964), Patton v. Administrator of Civil Aeronautics, 217 F.2d 395 (9th Cir. 1955); executive orders, Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972), vacated on other grounds 477 F.2d 1 (3d Cir. 1973); state laws incorporated by reference into Stokes v. Adair, 265 F.2d 662 (4th Cir. 1959); Mater v. Itolley, 200 F.2d 123 (5th Cir. 1957); and Federal common law, State of Illinois v. City of Milwaukee, 406 U.S. 91 (1972). Any rule with the force of law which "owes its authority to the United States" is a law of the United States within § 1331. Clearly a Military Law, promulgated by an American Military Governor appointed by the President, both of them acting pursuant to the President's powers as Commander-in-chief, and enforced by American military officials is such a law of the United States.

Nor is there serious question that plaintiff's Military Law 59 claim "arises under" that Law. Articles I and II of Military Law 59. The underlying issue in the case is whether plaintiff was "wrongfully deprived of . . . property . . . for reasons of race, religion, nationality, ideology or political opposition to National Socialism." Article 1(1). The Court of Restitution Appeals held in the first Dreyfus v. Merck, Fink & Co. appeal* that the question of whether the August, 1948, settlement was enforceable was itself a matter to be resolved under Military Law 59. And in Guggenheim v. Pabst** the court held that, where Fraud in the procurement of a settlement of a Restitution claim is alleged, that question too should be resolved under Law 59.

The final question with regard to Military Law No. 59 is whether it must, under the present circumstances, be regarded as limiting the vindication of the rights created by it to the procedures established. Article 56 makes the filing of a timely claim with the Central Filing Agency a prerequisite to legal action, but plaintiff filed such a claim on July 17, 1948, six months before the deadline. Article 57 expressly provides that Law 59 is not the exclusive remedy, for independent actions in tort may be prosecuted in other appropriate courts.

* Court of Restitution Appeals, v. 1, p. 149 (1951)

** Id., Opinion No. 10.

Article 57 also provides that "[U]nless otherwise provided in this Law, any claim within the scope of this Law may be prosecuted only under the provisions . . . set forth in the Law." Article 59(1) gives the Restitution Authorities plenary power to "deviate in individual cases from the procedural rules declared applicable by this Law."

The passage of time has rendered difficult the application of these principles to the instant case. The "Restitution Authorities" referred to in Article 59(1) no longer exist in the form and sense that obtained in 1950, and the Court of Restitution Appeals -- the overall adjudicatory body -- has been abolished. Plaintiff believes that in the face of these facts this issue should be remanded to the District Court for an exercise of discretion as to whether this matter should be heard in the Southern District of New York or be referred to the substantially altered procedures which now exist in Germany. Such an exercise of discretion would be particularly important since it would be closely related to the questions never resolved by the District Court regarding forum non conveniens.

POINT IV

THE ACT OF STATE DOCTRINE DOES NOT PRECLUDE THE EXERCISE OF JURISDICTION IN THIS CASE

The Act of State Doctrine is a judicially fashioned rule of law that, under certain circumstances, the federal courts will not inquire into or adjudicate the legality of acts of officials of a foreign government.

In his first opinion Judge Brieant held that the Act of State Doctrine precluded the exercise of federal jurisdiction in this case (App. L, p. 10). In its second opinion the district court did not squarely resolve this issue, preferring to rely on its conclusion that the complaint failed to state a cause of action (App. T, p. 22).

The seminal case on this issue is Bernstein v. N.U. Nederlandsch-Amerikaansuhe, etc., 173 F.2d 71 (1949), modified, 210 F.2d 375. Bernstein asserted facts essentially similar to those alleged here -- that property owned by him in Germany before the war had been taken from him by coercion pursuant to the Nuremberg Laws of 1935 because he was a Jew. In its initial opinion this Court concluded that the Act of State Doctrine barred the action. Thereafter a letter was issued by the U.S. Department of State representing that the maintenance of actions

of this type would not interfere with the conduct of American Foreign policy. This Court concluded on the basis of this letter that "claims asserted in the United States for the restitution of identifiable property (or compensation in her thereof) lost through force, coercion or duress as a result of Nazi prosecution in Germany could be litigated." 210 F.2d at pp. 375, 376.

The instant case presents a claim squarely within the language of this Court's holding in Bernstein. Plaintiff sues for restitution or compensation because of the taking of his property through coercion as a result of such Nazi prosecution. The "Bernstein letter" issued in 1954 is still in effect. Thus the issue in this regard is whether this Court's decision in the Bernstein case is still good law. The district court did not suggest this Court had itself overruled Bernstein, but suggested a majority of the Supreme Court might do so in view of that Court's opinions in First National Bank v. Banco National De Cuba, 406 U.S. 759 (1972) and Banco National De Cuba v. Sabbatino, 376 U.S. 398 (1964).

As the district court correctly noted, the Supreme Court is divided on the problems raised by the Act of State Doctrine. In First National, three members of the Court, Justice White, Justice Rhenquist and the Chief Justice sanctioned

a per se rule that the applicability of a "Bernstein letter" automatically lifts the Act of State bar. See 406 U.S. at 768. The remaining Justices concluded that the issuance of a letter was not controlling, and that the courts were compelled to decide for themselves whether under the circumstances judicial scrutiny of the claim was appropriate. Five of these six Justices adhered to the standard for a case by case adjudication as announced earlier in Sabbatino. See 406 U.S. at 777-796.

The Court in Sabbatino listed three factors which militate in favor of an exercise of federal jurisdiction even though the validity of acts of a foreign state was at issue: (1) whether there was a substantial degree of consensus concerning the legality of the action taken under international law, (2) whether the government which perpetrated the challenged action is no longer in existence, (3) whether a decision holding that action unlawful is likely to cause serious foreign relations problems. 376 U.S. at 427-28. All three of those factors are present in the instant case. First, as the district court conceded, the propriety of the type of confiscation involved in this case is no longer a matter of dispute, but has been "universally condemned." Second, the Nazi regime which was involved in these activities is no longer in existence. Third, the foreign relations of the United States cannot be adversely affected by a judicial recognition of the validity of such

confiscations. On the contrary, for 28 years, since the adoption of Military Law No. 59, it has been the position and policy of the United States that these confiscations were unlawful, a policy concurred in by its wartime allies and the present German authorities. Whatever the relevance of the Act of State Doctrine might have been in 1938, it has certainly been rendered inapplicable to a case such as this by World War II and the events which followed.

CONCLUSION

For the foregoing reasons the Corrected Order and Judgment of the District Court dismissing the amended complaint herein should be in all respects vacated and the action remanded for further proceedings.

Respectfully submitted,

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